



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Waste Management of North America

File: B-225551; B-225553

Date: April 24, 1987

DIGEST

1. Where a bill is enacted into law after bid opening that, in protester's view, precludes award under the solicitation, 10-day period for filing protest begins when protester learns of award, since protester could assume up to the time of award that agency would act in accordance with the statute.

2. Under current statutory scheme established by the Competition in Contracting Act and subsequent legislation, all small business set-asides, whether made unilaterally by procuring agency or based on joint determination by agency and Small Business Administration, are regarded as in furtherance of the Small Business Act. Therefore, statutory limitation on set-aside programs under the Small Business Act applies to unilateral as well as joint set-asides.

3. Statute that prohibits setting aside more than 30 percent of the total dollar amount of contracts "for construction and refuse systems and related services," although literally imposing the limitation on the aggregate dollar amount for both categories, must be read as prohibiting the setting aside of more than 30 percent of the total dollar amount for each of the two industry categories in light of the clear congressional intent to do so which is made evident by related provisions of the statute.

DECISION

Waste Management of North America protests the award of two contracts by the Naval Training Center, Great Lakes, Illinois (NTC) for solid waste collection and disposal under solicitation Nos. N62472-86-B-7764 and N62472-86-B-7756. The basis of these protests is that the procurements were 100 percent small business set-asides, allegedly in violation of section 921(j) of Pub. L. No. 99-661, Stat. _____, (1986), the Fiscal Year (FY) 1987 Department of Defense Authorization Act.

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PUBLISHED DECISION
AS COMD. GEN. _____

We sustain the protests.

BACKGROUND

On August 4, 1986, solicitation No. N62472-86-B-7756 was issued for collection and disposal of all solid waste material for the family housing facility located at the NTC as a 100 percent small business set-aside. Bids were opened on October 3. The contract under this solicitation was awarded to Flood Brothers Disposal on November 26, and called for a contract period of 1 year commencing 15 days from the date of award.

On October 15, solicitation No. N62472-86-B-7764 was issued, calling for the collection and disposal of all solid waste material from the remaining portion of the NTC facility. This solicitation was also issued as a 100 percent small business set-aside. Bids were opened on November 14. The contract under this solicitation was awarded to Flood Brothers Disposal on November 28. The two contracts described above represent virtually 100 percent of the NTC's refuse collection requirement for FY 1987.

On November 14, the President signed into law Pub. L. No. 99-661, which provides as follows in section 921(j):

"Of the total dollar amount of the contracts awarded for fiscal year 1987 for construction and refuse systems and related services at Great Lakes Naval Training Center, Illinois, not more than 30 percent of such dollar amount may be under contracts awarded through the so-called small business set-aside programs under sections 8 and 15 of the Small Business Act."

On December 10, the protests were filed in our Office alleging that the contracts were awarded in violation of section 921(j), since they were both 100 percent small business set-asides and represented approximately 100 percent of the total dollar amount for refuse collection at the NTC for FY 87.

TIMELINESS

As a threshold matter, the agency argues that Waste Management's protests are untimely. According to the agency,

the protester knew on November 14 that the agency intended to award the contracts in question in apparent violation of section 921(j). The agency bases its position upon the allegation that on that date the protester was aware that both solicitations had been issued as small business set-asides and that the statute had been signed into law. Consequently, the protester was required to, but did not, file its protests in our Office within 10 working days of November 14.

We do not find this argument persuasive. The fact that the statute was enacted on November 14 does not mean that Waste Management knew from that date that the Navy would proceed with the set-aside awards. Bidders may assume that contracting officials will act in accordance with law and regulation; it is only when they learn that officials will not act or proceed in a way that is consistent with what the bidder believes to be correct that a basis for protest arises. R.R. Gregory Corp., B-217251, Apr. 19, 1985, 85-1 C.P.D. ¶ 449. The agency does not suggest that after the enactment of Pub. L. 99-661 it did anything to place Waste Management on notice of its intent to proceed with the awards. Thus, it is only when Waste Management learned of the awards that its 10 working-day period for filing a protest began. (See 4 C.F.R. § 21.2(a)(2) (1986).) It clearly protested within that period, and thus the protests are timely.

APPLICABILITY OF SECTION 921(j)

The agency also contends that the contracts do not come within the scope of section 921(j). Specifically, the agency argues that these are "unilateral" set-asides, not joint set-asides made under section 15 of the Small Business Act, 15 U.S.C. § 644 (1982), to which section 921(j) refers.

Under section 15 of the Small Business Act, the procuring agency and the Small Business Administration (SBA) jointly determine procurements to be set aside for small business. Prior to the effective date of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, defense agencies also made "unilateral" set-asides, that is, without SBA concurrence, pursuant to the authority of 10 U.S.C. § 2304(a)(1) (1982), under which agencies could negotiate procurements without using formal advertising whenever "it [was] determined that such action [was] necessary in the public interest during a national emergency declared by Congress or the President." See 30 Comp. Gen. 441 (1951). However, CICA eliminated both the preference for advertised procurements and the 17 exceptions, including the national emergency authority used for unilateral set-asides, that could be invoked to permit the use of negotiation.

The law now establishes two major procurement categories, competitive and noncompetitive. See 10 U.S.C. § 2304 (Supp. III 1985). Small business set-asides "in furtherance of section 15 of the Small Business Act" are designated as competitive. 10 U.S.C. §§ 2302(2)(D) and 2304(b)(2) (Supp. III 1985). Since the law does not otherwise refer to or specifically provide for unilateral set-asides, and since there is absolutely no suggestion in the legislative history of CICA or any subsequent legislation that Congress intended to eliminate the unilateral set-asides that have been an important aspect of federal procurement for more than 30 years, we believe the phrase "in furtherance of section 15 of the Small Business Act" was intended to encompass both unilateral and joint set-asides. Thus, we believe that under the present statutory scheme all set-asides, whether unilateral or joint, are viewed as furthering the purposes of section 15 of the Small Business Act and as such are authorized to be conducted as competitive procurements.

That being so, we also view the Navy's unilateral set-asides as coming within the purview of section 921(j). Although that section refers to the "set-aside programs under sections 8 and 15 of the Small Business Act," in the context of the current statutory authority for competitive small business set-asides, which treats all set-asides as under the umbrella of sections 9 and 15 of the Small Business Act, we think section 921(j) is directed to all small business set-asides, not just to joint set-asides. We therefore do not agree with the Navy that section 921(j) does not apply here.

REQUIREMENTS OF SECTION 921(j)

The protester argues that the language of section 921(j) requires that, in each of the articulated categories (i.e., construction and refuse systems and related services), no more than 30 percent of the total dollar amount of contracts may be set aside for small businesses. The agency argues that the 30 percent limitation refers to both contract categories in the aggregate. Thus, the agency argues that it could properly have awarded 100 percent of the total dollar amount for contracts for refuse systems and related services so long as this dollar amount, when aggregated with the total dollar amount set aside for small businesses for contracts for construction, does not exceed 30 percent of the total dollar amount for contracts in both categories.

We think that, to understand what Congress intended in section 921(j), we must look to the remainder of section 921. That section reflects congressional concern that in certain industries small business concerns are receiving a percentage of contract awards that is too high. Section 921(f) requires the Administrator of the SBA to conduct a review of size

standards for each of four enumerated industry categories and, on the basis of such a review, to adjust the size standards for those industries so that no more than approximately 30 percent of the total dollar amount for contracts in those industry categories will be awarded through set-asides. The four enumerated categories are:

- "(i) Construction.
- "(ii) Architectural and engineering services (including surveying and mapping services).
- "(iii) Ship building and ship repair.
- "(iv) Refuse systems and related services."

This review requirement is effective immediately upon enactment; and the first review is required to be completed within 180 days of enactment. Section 921 also amends the Small Business Act, effective October 1, 1987, to require that a fair proportion of contracts be awarded to small businesses on a per-industry category basis, instead of on the basis of the totality of government contracts awarded, as is the case now. See, e.g., J.H. Rutter Rex Mfg. Co., Inc., 55 Comp. Gen. 902 (1976), 76-1 C.P.D. ¶ 182; Allied Maintenance Corp., B-188522, Oct. 4, 1977, 77-2 C.P.D. ¶ 259. Finally, section 921, in subsection (f), establishes a pilot program at a single government installation which was to reflect the salient aspects of the amendments made by the other provisions of section 921. See 132 Cong. Rec. H10127 (daily ed. Oct. 15, 1986) (Statement of Representative Aspin).

From a literal reading of the language of section 921(j), it is unclear whether the 30 percent limitation applies to each category or to the aggregate of contracts awarded in each specified category. However, a fundamental rule of statutory interpretation is that each part or section of a statute is to be construed in connection with every other part or section so as to produce a harmonious whole. See generally Sutherland, Stat. Const. § 46.05 (4th ed.) Based upon the above principle, we believe that section 921(j), when construed with the rest of section 921 which clearly seeks to place a specific limit on small business set-aside awards in each of four discrete categories, calls for a pilot program in which no more than 30 percent of the total dollar amount for contracts in each of the two articulated industry categories is to be set aside for small businesses. Certainly there is no apparent reason why the construction and refuse collection industries would be combined in connection with what Congress was seeking to accomplish; in

fact it would seem that aggregating the two industries, as the Navy urges should be done, would defeat what Congress had in mind. Thus, we agree with the protester that the 30 percent limitation applies to each category.

Accordingly, since the two contracts under consideration exceed the statutory directive contained in section 921(j) as they represent virtually 100 percent of the total dollar amount for refuse collection at the NTC for FY 1987, we sustain the protests. We are recommending that the Navy take appropriate action to bring these procurements into compliance with Pub. L. 99-661, terminating both contracts and resoliciting on an unrestricted basis or, at the very least, terminating the contract awarded under solicitation No. N62472-86-B-7764 (since this contract represents slightly more than 70 percent of the total dollar amount for contracts for refuse collection).

The protests are sustained.

Milton F. Jordan
for Comptroller General
of the United States